IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO.138 OF 2005

Shri Anil Kunkolienkar,
son of Ramkrishna Kunkolienkar,
age 60 years, occ: service,
resident of H.No.365,
Fatorda-Margao, Goa. .... Appellant

- Versus -

1. Shri Vishwasrao Dattaji
Chowgule, son of Dattaji
Chowgule, age 89 years,
Industrialist, r/o Baina,
Vasco-da-Gama, Gao.

2. Shri Manueal Gaonkar
(ex parte) of major age,
r/o Fatorda, Margao,
Taluka Salcete, Goa. .... Respondents

Shri Sudesh Usgaonkar with Ms Priyanka Kamat
for the Appellant.

Shri S.D. Lotlikar, Senior Advocate, with
Ms K. Sambari for the Respondents.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: FEBRUARY 24, 2006

ORAL ORDER:

1. Heard. The concurrent judgments passed by the Courts below are sought to be challenged as giving rise to the following substantial questions of law:

(i) Whether the Courts below misread and misconstrued the deposition of PW-1 to assume that the contents of para 7 of the plaint was proved?

(ii) Whether the Courts below misconstrued the Deed of Settlement dated 14-2-1971 which if considered would show that the temple was not included in the property purchased by the respondent?

2. It is strenuously argued on behalf of the appellant/defendant No.1 that the whole dispute in the suit related to the identity of the property bearing Chalta No.2 of PT Sheet No.75 in the city of Madgaon and it was the claim of the respondent/plaintiff that the same forms part of the property alleged to have purchased by the plaintiff and registered under description No.32610 and matriz No.2225 whereas it was the case of the appellant that the property purchased by the respondent/plaintiff does not include the property bearing Chalta No.2 of PT Sheet No.75. According to the learned Advocate for the appellant, both the Courts below, without considering this aspect, proceeded on the assumption that the property purchased by the respondent includes the property bearing Chalta No.2 of PT Sheet No.75.

3. The trial Court on the basis of the pleadings and the materials placed on record had framed four issues

which read thus:

"1. Whether the plaintiff proves that the suit property is exclusively, owned, possessed and enjoyed by the plaintiff and that the defendants or any other persons have no right of whatsoever nature to the same?

2. Whether the plaintiff proves that he constructed the present Temple to house the said Mahadev or Damodar Linga at his own costs?

3. Whether the plaintiff proves that the affairs of the said Temple has always been managed, supervised and controlled by him?

4. Whether the defendants prove that the suit property is surveyed under Chalta no.2 of P.T. Sheet no.75 and is in the property of the Damodar Devasthan?"

All the first three issues were answered in the

affirmative whereas the fourth issue was answered in the negative. The lower Appellate Court while dealing with the appeal filed by the appellant framed the

following three points for determination:

> "1. Had the plaintiff proved that the suit property is owned, possessed and enjoyed by the plaintiff?
>
> 2. Had the defendant no.1 proved that the suit property under Chalta no.2 of PTS no.75 is the property of the Damodar Devasthan?
>
> 3. Had the plaintiff proved that the defendants had no right to do any construction in the suit property?

The first and the third points were answered in the affirmative and the second point was answered in the negative. Apparently, there are concurrent findings by both the Courts below on the point of ownership and possession of the suit property.

4. Plain reading of the plaint and the written statement would reveal that the respondent/plaintiff

had filed the suit for injunction with specific averment that the western part of the property purchased by the plaintiff bears Chalta Nos.1, 2, 3 and 4 of P.T. Sheet No.75. In answer to the said

plea of the plaintiff, it was the case of the appellant/defendant that the property bearing Chalta Nos.1, 2, 3 and 4 do not form part of the property purchased by the respondent but it is an independent property and it belongs to Damodar Devasthan. It was also stated that Damodar Devasthan is a society and the appellant is the member of the said society. Both the Courts below have arrived at a specific finding that though the appellant claims the property bearing Chalta No.2 of P.T. Sheet No.75 to be belonging to Damodar Devasthan and that he claimed that he can produce evidence in that regard, the appellant failed to produce any such evidence.

5. Undoubtedly, a certificate of record of rights in relation to the property bearing Chalta No.2 discloses the occupant thereof being Damodar Temple. It is not in dispute that in the said area there exists a Damodar Temple. It was rather the specific case of the respondent/plaintiff in the plaint itself that the said temple is being managed by the plaintiff including the expenditure regarding renovation,

payment of salary of the priest attached to the temple, expenditure regarding the electricity provision and the electricity charges, etc. Being so, it is apparent that while the plaintiff had approached the Court with the specific plea of ownership and

possession of the property, it was the case of the appellant that the property belongs to some different entity called Damodar Devasthan. It was not the case of the appellant that the appellant has independent interest or right of whatsoever nature in the property. He merely claimed to be a member of the society called Damodar Devasthan. Undisputedly, there is no evidence produced by the appellant on record to show that the property belongs to Damodar Devasthan, a society. There is nothing on record to show that the appellant is a member of any such registered society by name Damodar Devasthan. Apparently, it was a case wherein the plaintiff claimed the ownership and possession of the suit property whereas the defendant claimed that the property belonged to someone else, without disclosing any sort of interest in his favour in relation to the said property or right to defend the alleged interest of Damodar Society in the suit property, nor even establishing any right in favour of Damodar Devasthan. Merely because the property consists of a temple of which the appellant is one of

the devotees of the deity in the temple, that by itself cannot create any right in favour of the appellant in the property. Both the Courts, therefore, were justified in arriving at the finding about absence of any right in favour of the appellant to raise any objection to the ownership right as well

as possessory right of the respondent in relation to the property in question.

6. Perhaps under normal circumstances, the appellant would have been justified in contending that primarily it would have been the obligation of the plaintiff to establish that the property bearing Chalta No.2 of P.T. Sheet No.75 formed part of the property purchased by the plaintiff once there was a claim to that effect by the plaintiff in the plaint. However, in answer to the said claim, there was a specific plea raised by the defendants, without claiming any independent right in favour of the defendants in the property, that the property belonged to Damodar Devasthan. If really the property belonged to Damodar Devasthan, it would be for the said society to defend the alleged right in relation to the property. In the absence of any right in favour of the appellant to act on behalf of Damodar Devasthan Society to defend its right, if any in the property, the question of the

appellant expecting the plaintiff to come forward with any further evidence in relation to each and every plea in the plaint, does not arise at all, more particularly, in view of the documentary evidence produced by the plaintiff in relation to ownership and possession of the property.

7. When the defendant does not disclose any right in his favour to interfere with a particular property which is claimed by the plaintiff as his own and possessed by him and such claim by the plaintiff is supported by documentary evidence, the burden would lie on the defendant to establish any plea contrary to the plea established by the plaintiff based on the documentary evidence relating to the property. Such an approach is absolutely necessary to discourage the busy-bodies and strangers, from interfering with the properties owned and possessed by the persons with lawful title to the properties. Mere denial of the plea of the plaintiff, without disclosing any right, cannot be sufficient to oust the plaintiff or to non-suit the plaintiff. Being so, no fault can be found with the concurrent findings arrived at on detail analysis of the evidence on record by the trial Court and by the Appellate Court on the aspect of ownership and possession of the suit property in

favour of the respondent and the same does not give rise to any sort of substantial questions of law for the consideration by this Court.

8. It is also to be noted that the trial Court had framed specific issue being issue No.4, quoted above, which clearly required the appellant to prove that the plot Chalta No.2 of P.T. Sheet No.75 is the property

of Damodar Devasthan. At no point of time, either before the trial Court or before the lower Appellate Court, the appellant had made any grievance about the burden being cast upon the appellant under the said issue. On the contrary, there was a clear understanding between the parties that the said issue was required to be established by the appellant. The appellant has utterly failed to establish the said issue. It is too late for the appellant to make grievance about the burden in that regard being cast upon the appellant and, more particularly, in the facts and circumstances of the case.

9. It was also sought to be contended on behalf of the appellant that the entire evidence in the matter was led by the respondent through his attorney. It is pertinent to note that at no point of time any objection was raised by the appellant for the attorney

deposing on behalf of the respondent. At no point of time the admissibility of any evidence which was placed on record was sought to be disputed by the appellant. Even at the time of filing of the appeal before the lower Appellate Court this ground was not raised. Being so, once the evidence having been admitted, it is too late for the appellant to raise dispute about the admissibility of the evidence including about the statements made by the attorney of

the respondents.

10. The Apex Court in **Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd., and others,** reported in AIR 2005 SC 439, has held that a general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff and the ruling to the contrary in **Humberto Luis v. Floriano Armando Luis** {(2002) 2 Bom.C.R. 754} has been set aside. In **Janki Vashdeo Bhojwani's** case, after discarding the oral evidence which was produced by the attorney in his capacity as party to the suit proceedings, the Apex Court had proceeded to analyse the documentary evidence on record. Obviously therefore, the law has been laid down to the effect that a power of attorney holder cannot be allowed to appear as a witness on behalf of

the plaintiff in the capacity of the plaintiff, but at the same time, it is clear that there is no prohibition for examining him as a witness in relation to the facts which are to his personal knowledge. Besides, bar in that regard does not apply to the production of documentary evidence on record.

11. Any such documentary evidence produced by the attorney, the Court will have to consider that documentary evidence and will have to ascertain

whether the case of the party has been established on the basis of the documentary evidence or not. Besides, the law that a power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in capacity of the plaintiff has been further explained in the same judgment to mean that such an attorney holder cannot depose the facts which are in exclusive personal knowledge of the plaintiff but it does not prohibit the attorney from bringing on record the facts which are to his personal knowledge and simultaneously to the knowledge of the party. Being so, unless at the time of recording of the evidence it is brought to the notice of the Court that the particular fact which is being deposed cannot be in the personal knowledge of such a witness, even assuming that the witness states a particular fact

which was also to the knowledge of the plaintiff and therefore communicated to him, that by itself would not amount to categorise such a statement to be a hearsay statement. In order to contend a particular piece of evidence to be a hearsay statement, the testimony should disclose to be not within the knowledge of the person deposing about the fact and this has to come on record in the course of the testimony of the person whose testimony is sought to be disputed as a hearsay testimony, unless the statement per se discloses to be a hearsay statement.

It is to be noted that at no point of time before the trial Court or before the lower Appellate Court any dispute was sought to be raised about any part of the testimony of the witness examined on behalf of the respondent to be the hearsay evidence.

12. Even otherwise, considering the fact that the finding regarding the property being owned and possessed by the respondent having been based on the documentary evidence coupled with the failure on the part of the appellant to establish that Chalta No.2 of P.T. Sheet No.75 belongs to Damodar Devasthan Society, as claimed by the appellant, the point regarding the alleged hearsay evidence is of no relevancy for decision in the matter

13. Drawing attention to the deed of settlement, it was also sought to be argued that it discloses a clear admission on the part of the respondent that the property which was purchased by the respondent was part of the property with a particular description. Undoubtedly, the deed of settlement was executed in the year 1971 which refers to purchase of the property by a Hindu undivided family with specific reference to part thereof. Same is to be found in the preface portion of the deed of settlement. It is to be noted that the deed of settlement has been explained in the

plaint as well as in the course of the testimony that it related to the exclusion of the area occupied by Damodar Temple and more particularly bearing Chalta No.2 of P.T. Sheet No.75. It is also to be noted that the witness who was examined on behalf of the appellant was not cross-examined on this aspect. Nothing is brought to my notice in the testimony of the witness examined on behalf of the respondent which could reveal any question having been asked on the aspect of such a recording in the deed of settlement. The deed of settlement is not a document of title for deciding the issue of ownership and possession of the suit property in the case in hand. The document of title is the sale deed and which apparently discloses

the purchase of the property bearing a specific description number. Being so, merely because the deed of settlement specifically excluded the property bearing Chalta No.2 having Damodar Temple therein, and it referred to part of the property having been purchased by the plaintiff and being the subject-matter of the deed of settlement, that by itself will not lead to the conclusion that the property which was purchased by the plaintiff was only a part of the property. The deed of settlement was essentially relating to the part of the property and therefore it referred to the part of the property only. There was no reason for the parties to the deed

of settlement to refer to the entire property purchased by the respondents as the entire property was not the subject-matter of the settlement. The deed of sale clearly discloses the description of the property necessary to identify the property which was purchased by the party.

14. For the reasons stated above, therefore, I do not find either the questions framed and quoted above or any other substantial question of law arising in the matter for consideration thereof in exercise of powers under Section 100 of the Code of Civil Procedure, 1973 and, therefore, the appeal fails and is hereby

dismissed.

(R.M.S.Khandeparkar,J.)

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